

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

United States Telecom Association Petition for
Declaratory Ruling that Incumbent Local
Exchange Carriers are Non-Dominant in the
Provision of Switched Access Services

WC Docket No. 13-3

DA 13-21

**COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

GEOFFREY G. WHY, COMMISSIONER

1000 Washington Street, Suite 820
Boston, MA 02118-6500
(617) 305-3580

Dated: February 25, 2013

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

United States Telecom Association Petition for
Declaratory Ruling that Incumbent Local Exchange
Carriers are Non-Dominant in the Provision of
Switched Access Services

WC Docket No. 13-3

DA 13-21

**COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

The Massachusetts Department of Telecommunications and Cable (“MDTC”)¹ respectfully submits these comments in response to the Public Notice released by the Federal Communications Commission (“FCC”) on January 9, 2013.² In the Public Notice, the FCC seeks comment on the United States Telecom Association’s (“USTelecom”) petition filed on December 19, 2012 that requests a declaratory ruling that incumbent local exchange carriers (“ILECs”) are non-dominant in the provision of switched access services (“Petition”). The MDTC submits that in order for the FCC to properly analyze the Petition, it must, pursuant to FCC precedent, require USTelecom to make an affirmative showing that ILECs are non-dominant in all markets in which it seeks elimination of dominant-carrier regulations.

¹ The MDTC regulates telecommunications and cable services within the Commonwealth of Massachusetts and represents the Commonwealth before the FCC. MASS. GEN. LAWS ch. 25C, § 1; MASS. GEN. LAWS ch. 166A, § 16. Silence on any matter not addressed in these comments does not connote agreement or opposition by the MDTC.

² *In the Matter of U.S. Telecom Assoc. Petition for Declaratory Ruling that Incumbent Local Exch. Carriers are Non-Dominant in the Provision of Switched Access Servs.*, WC Docket No. 13-3, *Pub. Notice* (rel. Jan. 9, 2013).

I. THE FCC SHOULD REQUIRE USTELECOM TO PROVIDE MORE INFORMATION BEFORE MOVING FORWARD WITH THIS PROCEEDING.

USTelecom, in its Petition, seeks relief for all ILECs from dominant carrier status regulations, which include the obligation to file tariffs with applicable cost support.³ USTelecom presents a significant amount of broad, generalized data that, while providing some insight into the switched access services voice market on a national, aggregated level, fail to demonstrate that ILECs are non-dominant in every switched access services market. In addition, the MDTC urges the FCC to consider states' unique abilities to assess local market conditions and protect the millions of consumers who still lack access to alternatives to plain old telephone service ("POTS") from ILECs for voice communication.⁴

A. USTelecom Must Provide More Data To Justify The Requested Relief.

USTelecom continually references the FCC's *AT&T Order*⁵ in the Petition, but selectively quotes from that order rather than putting the entirety of the FCC's analysis in the proper context.⁶ USTelecom correctly states that the FCC defines a dominant carrier as one that possesses market power.⁷ USTelecom also correctly notes that in 1995, the FCC granted AT&T

³ Petition at 9.

⁴ USTelecom acknowledges that up to 18% of the population lacks access to 3G or 4G wireless service, and up to 15% of Americans do not have access to a cable provider. Petition at 46. And of course, not all cable systems that do exist in the country have been upgrade sufficiently to support voice communication. Compare MDTC, COMPETITION STATUS REP. xi (2010), available at <http://www.mass.gov/ocabr/docs/dtc/compreport/competitionreport-combined.pdf> (last visited Feb. 15, 2013) ("MDTC Competition Report") (finding that 308 of the 351 municipalities in Massachusetts have at least one cable service carrier providing cable video service), with MDTC Competition Report at iv (finding that only 301 of the 351 Massachusetts municipalities have at least one cable service carrier providing voice services).

⁵ *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, 11 FCC Rcd 3271, Order (rel. Oct. 23, 1995) ("AT&T Order").

⁶ E.g., Petition at 14-15.

⁷ *Id.* at 12; see also *In the Matter of Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, ¶ 54 (rel. Nov. 28, 1980) ("Competitive Carrier First Report & Order").

non-dominant status in the interstate, domestic, interexchange market.⁸ USTelecom, however, fails to apply the FCC's market power analysis in the *AT&T Order* to the current switched access services market. In the *AT&T Order*, the FCC focused its market power analysis on: "(1) AT&T's market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T's customers; and (4) AT&T's cost structure, size and resources."⁹ The terms "supply elasticity" and "demand elasticity" do not appear in the Petition, nor does any mention of ILECs' cost structure, size, or resources.¹⁰ In other words, USTelecom has addressed only one element of the FCC's four-part market power analysis.

USTelecom goes into great lengths to attempt to demonstrate ILECs' market share in the national switched access services market.¹¹ But in so doing, USTelecom conflates the idea of market *share* with the FCC's dominance standard of market *power*.¹² While market share is certainly an aspect of market power, USTelecom too often in the Petition relies on the ILECs' purported market share exclusively, stopping well short of conducting a full market power analysis.¹³ The Petition, without more information, simply lacks the foundation for entry of the requested declaratory ruling.

Moreover, as further explained below, data aggregated on a national level does not address the market power of ILECs in areas of the United States with no other voice options. USTelecom characterizes the changes that it describes in the communications

⁸ Petition at 14; *see also AT&T Order*.

⁹ *AT&T Order*, ¶ 38. The MDTC currently takes no position regarding whether a market power analysis of the type used in the *AT&T Order* is appropriate for carrier dominance analysis in the switched access services market.

¹⁰ *See* Petition.

¹¹ *Id.* at 24-43. The MDTC questions some of the data USTelecom uses and reserves its right to dispute such data should the FCC continue this proceeding.

¹² *Id.* at 24 (comparing the reasoning in the *AT&T Order* with USTelecom's own "market share analysis" in the Petition).

¹³ *See, e.g., id.* at 24, 25, 42-44.

marketplace as “pervasive and ubiquitous,” but provides no data to support that claim.¹⁴

USTelecom glosses over the idea that analysis at a more granular level may be appropriate, dispensing with any geographic analysis in one sentence.¹⁵ Simply put, in order to demonstrate that ILECs should be categorized as non-dominant, USTelecom has to actually make that demonstration at an appropriately granular level, and this is not done by providing only general, national statistics.

Finally, USTelecom repeatedly references costs of compliance with existing regulations as an impediment.¹⁶ USTelecom, however, never attempts to quantify these costs or otherwise demonstrate the extent of the burden.¹⁷ As USTelecom notes, the FCC has recognized that “a rough cost/benefit analysis suggests that the costs of continuing to regulate the service offerings of any carrier or class of carriers by means of the prevailing tariff, entry, and exit rules exceed the benefits” such regulations may be dispensable.¹⁸ USTelecom provides no such cost/benefit analysis.¹⁹ USTelecom merely offers conclusory statements and generalities on purported regulatory costs without ever providing the FCC with actual analysis.²⁰

In short, USTelecom’s combination of general, national data and lack of substantive analysis does not provide the FCC sufficient information on which to enter the requested declaratory ruling.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 3, 12, 23.

¹⁷ *See id.*

¹⁸ *Id.* at 12 (quoting *Competitive Carrier First Report & Order*, ¶ 4).

¹⁹ *Id.*

²⁰ *E.g., id.* at 12.

B. If The FCC Conducts A Market Power Analysis, It Should Not Use A National Geographic Market.

Should the FCC choose to proceed with an analysis of the merits of the Petition, it should not use a national geographic market for purposes of analyzing carrier dominance in the switched access services market. In the Petition, USTelecom cites the *Competitive Carrier Fourth Report & Order*²¹ and the *AT&T Order* as support for its claim of non-dominance.²² The problem with this comparison is that in those proceedings the FCC established a single, national geographic market for long distance services.²³ However, the FCC specifically qualified this geographic market definition as applying to only “interstate, domestic, interexchange telecommunications services.”²⁴ The FCC based its geographic market determination on two key characteristics of the long distance market: supply substitutability and low entry barriers.²⁵

USTelecom has not demonstrated that these characteristics are present in all areas of today’s switched access services market. In the long distance market, the “substitute” carriers did not need to serve every home directly to be an effective substitute for every home.²⁶ Such carriers could serve an end user by interconnecting to a regional bell operating company from a remote location.²⁷ A national geographic market was thus defensible because a consumer could realistically choose a long distance carrier located in another state. On the contrary, in the local

²¹ *In the Matter of Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, CC Docket No. 79-252, *Fourth Report & Order* (rel. Nov. 2, 1983) (“*Competitive Carrier Fourth Report & Order*”).

²² Petition at 12-15.

²³ *Competitive Carrier Fourth Report & Order*, ¶ 26; *AT&T Order*, ¶ 22. Even in the long distance market the FCC later recognized that a smaller geographic market is more accurate. *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Servs. Originating in the LEC’s Local Exch. Area*, CC Docket No. 96-149, *In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Second Report & Order*, ¶ 64 (rel. Apr. 18, 1997) (“*LEC Classification Order*”). *Competitive Carrier Fourth Report & Order*, ¶ 26.

²⁴ *Id.*, ¶ 26. The FCC has since determined that demand substitutability, and not supply substitutability, is appropriate for defining relevant markets. *LEC Classification Order*, ¶ 27.

²⁵ *See Competitive Carrier Fourth Report & Order*, ¶ 26.

²⁶ *See id.*

switched access services market, in many regions there is no such substitute at the end user level that has the capability of serving every home.²⁸ For many consumers, the ILEC is only local voice service available.²⁹ In addition, this lack of substitutability will remain because, unlike in the long distance market, the barriers to entry into the switched access services market in certain areas remain high.³⁰ It would require a considerable, possibly prohibitive investment for a competitive local exchange carrier (“CLEC”) or other non-ILEC to provide local voice service to every home, particularly in rural areas.³¹ USTelecom has not made, nor even attempted to make the showing that these required investments are small enough to characterize the barrier as “low.”

The FCC initially defined the relevant geographic market as “the locations of the suppliers (1) to which buyers in any one area practicably can turn for alternative sources of supply, or (2) which otherwise check the prices charged to those buyers.”³² The FCC later refined this definition, over the objection of USTelecom’s predecessor, to reflect the merger guidelines of the Department of Justice and the Federal Trade Commission.³³ Specifically, the FCC stated that in determining geographic market, the examination rests on whether a “small but significant and nontransitory” increase in price of the product at one location would cause a

²⁸ See, e.g., MDTC Competition Report at 12-13, 54 (finding that there are areas in Massachusetts where as much as 14.5% of households do not have access to voice services from a cable provider and that “approximately 471 square miles (6%) of the land area in Massachusetts is without any Wireless Voice service”); FCC, Unserved Fixed Broadband Map, <http://www.fcc.gov/maps/unserved-fixed-broadband> (last visited Feb. 7, 2013) (showing that even minimal broadband service is not available in 3,700 Massachusetts census blocks, covering 64,000 people).

²⁹ *Id.*

³⁰ See *In the Matter of Connect Am. Fund*, et al., WC Docket No. 10-90, et al., *Report & Order & Further Notice of Proposed Rulemaking*, ¶ 5 (rel. Nov. 18, 2011) (indicating that there are “costly-to-serve communities” in the United States where private sector investment is limited). MDTC Competition Report at 5.

³¹ *Competitive Carrier Fourth Report & Order*, ¶ 25.

³² *LEC Classification Order*, ¶ 64; see U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (1992, rev. ed. 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) 13,104, *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

buyer to purchase the product from a seller located at a second location, thus making the price increase unprofitable.³⁴ There are areas in Massachusetts, for example, where consumers simply are not able to purchase switched access service from a seller located at a second location.³⁵ Certainly if a Massachusetts residential consumer is not able to shift his or her purchase to a seller at a second location, the residential address of that consumer should not be included in the same geographic market as some hypothetical second location in another state.³⁶

The FCC recognized this in the *LEC Classification Order*, stating that even with regards to the long distance market “the [geographic] market to purchase that plan is a localized market, not a national one.”³⁷ If the FCC moves forward with this proceeding, it should make the same determination and find that a national geographic market is inappropriate for purposes of a dominance analysis in the local switched access services market.

C. The FCC Should Not Preempt States’ Abilities To Protect Consumers.

Regardless of what further action the FCC takes in response to the Petition, it must not intrude on states’ rights to protect consumers by setting policy and analyzing carrier dominance at the intrastate level. In the Petition, USTelecom itself describes ongoing state legislation and administrative proceedings, many of which it views favorably.³⁸ In Massachusetts, for example, the MDTC has taken strides to reform and modernize its telecommunications regulations. The

³⁴ *LEC Classification Order*, ¶ 64 n.174.

³⁵ *See supra* note 28.

³⁶ *See LEC Classification Order*, ¶ 64 n.174 (stating that if a buyer would not shift his purchase to a second location, the two locations should not be considered to be in the same geographic market).

³⁷ *Id.*, ¶ 65.

³⁸ Petition at 18-20 (“These state actions represent appropriate fact-based and forward-looking public policy and should be applauded.”). Similarly, USTelecom goes to great lengths to commend the FCC for setting up task forces and opening proceedings addressing the transition of POTS to IP and mobile service offerings. *Id.* at 4-5 & n.7. USTelecom conclusorily dismisses these proceedings even though its concerns may be addressed therein. *Id.* at 5, n.7.

MDTC's predecessor, the MDTE,³⁹ limited the intrastate access rates of Verizon, the only non-rural ILEC in Massachusetts, to no more than its interstate access rates in 2002.⁴⁰ Subsequently, the MDTE transitioned Verizon from a price cap carrier to an "Alt-Reg" carrier in 2003.⁴¹ In doing so, the MDTE permitted Verizon to increase its basic dial tone rate and move most of its other rates to market-based pricing.⁴² Finally, the MDTC reformed competitive carrier intrastate access rates in 2009, requiring CLECs to reduce their intrastate access charges to Verizon's composite intrastate access rate.⁴³

Since, as USTelecom notes, Massachusetts and a "large number" of other states have already begun to modernize and eliminate outdated telecommunications regulations,⁴⁴ it is unnecessary and would be imprudent at this time for the FCC to universally prohibit states from continuing to do so. As stated above, there are certain areas in Massachusetts—and likely in all states—where an ILEC remains the only voice option for consumers.⁴⁵ In these areas, a determination that ILECs are non-dominant and thus able to file tariffs without cost support would allow ILECs to raise rates without regard to market conditions, resulting in harm to consumers. The FCC should carefully consider all options and, more importantly, all consequences before moving forward in this proceeding.

³⁹ Prior to 2007, the MDTC was part of the MDTE, or Massachusetts Department of Telecommunications and Energy, which regulated utility providers in addition to telecommunications and cable providers.

⁴⁰ *Investigation by the Dep't of Telecomms. & Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc.*, D.T.E. 01-31 Phase I, *Order* (May 8, 2002).

⁴¹ *Investigation by the Dep't of Telecomms. & Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc.*, D.T.E. 01-31 Phase II, *Order* (Apr. 11, 2003).

⁴² *Id.*

⁴³ *Petition of Verizon New England, Inc., MCI Metro Access Transmission Servs. of Mass., Inc., d/b/a Verizon Access Transmission Servs., MCI Commc'ns Servs., Inc., d/b/a Verizon Bus. Servs., Bell Atl. Commc'ns, Inc., d/b/a Verizon Long Distance, & Verizon Select Servs., Inc. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exch. Carriers*, D.T.C. 07-9, *Final Order* at 7, 26-27 (Jun. 22, 2009).

⁴⁴ *Petition* at 18.

⁴⁵ *Supra* note 28 and accompanying text.

II. CONCLUSION.

The FCC should require USTelecom to provide additional information and make an affirmative showing that ILECs are non-dominant in all markets in which regulations would be relaxed. In addition, if the FCC addresses the merits of the Petition, the MDTC submits that the FCC must not preempt states' abilities to make their own determinations of whether a particular carrier, or class of carriers, is dominant in the local switched access services market at the intrastate level.

Respectfully submitted,

GEOFFREY G. WHY, COMMISSIONER

By: /s/ Sean M. Carroll

Paul Abbott, General Counsel
Karlen Reed, Competition Director
Sean M. Carroll, Counsel

Massachusetts Department of
Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500
Phone: 617-305-3580
Sean.m.carroll@state.ma.us

February 25, 2013